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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act;
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

**COMMENTS
OF
THE AMERICAN PETROLEUM INSTITUTE**

The American Petroleum Institute ("API"), by its attorneys and pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission" or "FCC"), hereby submits these Comments in response to the Notice of Proposed Rule Making ("Notice") adopted by the Commission on September 23, 1993 in the above-styled proceeding.^{1/}

I. PRELIMINARY STATEMENT

1. API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. The

^{1/} Notice of Proposed Rule Making, 58 Fed. Reg. 53489 (October 15, 1993).

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standing committees of the organization's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries.

2. API's continuing interests in matters affecting the licensing of radio spectrum are a matter of record. API member companies hold Commission licenses to operate, among other facilities, (1) point-to-point microwave systems in the Private Operational-Fixed Microwave Service ("POFS"); (2) POFS Multiple Address Systems ("MAS"); (3) 800/900 MHz systems in the Private Land Mobile Radio Service ("PLMRS"); (4) PLMRS systems operating at 470-512 MHz; (5) PLMRS systems below 470 MHz; and (6) various marine and aviation radio systems. Member companies also are authorized to operate satellite earth stations pursuant to Part 25 of the Commission's Rules and Regulations. Each of these radio systems fulfills a critical role in ensuring that the nation's petroleum and natural gas products are produced and distributed safely and efficiently.

3. The Commission tentatively concluded in the Notice that its newly enacted auction authority should not apply to applications for radio spectrum which is used principally to support internal, or "private," communications.^{2/}

^{2/} For purposes of the Notice, and based on the legislative history of the auction statute, the Commission uses the term "private services" to cover only services which are truly private; i.e., those services which support internal and non-subscriber based communications. Notice at ¶ 26. API concurs with the Commission's reading of the legislative history and, herein, uses the term "private" as it is used in the Notice.

API concurs with this conclusion and provides herein factual support to substantiate the exclusion of several types of private-use licenses from the auction process. API also urges the Commission to clarify that its tentative conclusion to auction "all" mutually exclusive common carrier applications cannot apply to applications for C and Ku-band satellite earth station licenses. API member companies, as well as other businesses with extensive private communications systems, operate a significant number of earth stations in the C and Ku-bands solely to meet their internal needs. Moreover, C and Ku-band earth station licensees successfully share this spectrum through well-established procedures. Consequently, two prerequisites for subjecting applications to auction -- that applications be mutually exclusive and that licensees use the spectrum principally to provide subscriber services -- do not exist for these categories of licenses.

4. Finally, API supports the adoption of stern measures designed to discourage trafficking in licenses won by lottery. The legitimate interests of API member companies have been prejudiced by past, rampant speculation in lotteries. The Commission should do its utmost to discourage abuse of the lottery process.

5. API regularly participates in Commission proceedings, such as this matter, which may affect its member companies' telecommunications systems. Accordingly, it is pleased to have this opportunity to submit the following Comments.

II. COMMENTS

A. API Supports the Commission's Proposal to Exempt "Private Services" From Spectrum Auctions.

6. Based on the language of Section 309(j) of the Communications Act of 1934, as amended, (i.e., the Commission's "auction authority") and its legislative history, the Commission tentatively concluded in the Notice that "applicants for spectrum used principally for internal uses and not for services to subscribers [should] be exempted from competitive bidding." Notice at ¶ 26. The rationale for exempting spectrum used for internal purposes is alluded to in Section 309(j)(2)(B) of the Act; namely, Congress believes that, while the public should recoup a portion of the value of the radio spectrum when the spectrum is used for subscriber-based communications enterprises, the public interest is better served by allowing applicants intending to use spectrum principally for internal purposes to continue to acquire spectrum by application only. API supports the Commission's decision to exempt from auctions those applications to license private-use systems; it is both consistent with the legislation and with the public interest.

7. API also supports the Commission's tentative decisions to (1) apply auction procedures based on whether specific categories of licenses are used principally for private purposes, Notice at ¶ 31; and (2) find that spectrum is principally used for private purposes when the majority of licensees (or potential licensees) use the spectrum internally a majority of the time, Notice at ¶ 32. Such an approach promotes administrative efficiency, and it gives

potential applicants the certainty they require to rationally plan and develop new telecommunications systems. System planners should know in advance whether they face potential auctions or lotteries for the spectrum they desire. Also, the practices of a minority of licensees in a particular license category should not subject the rest to possible auctions.

8. As to the categories identified in the Notice, API concurs with the Commission's tentative conclusions to exclude from auctions the following types of licenses:

- Private Operational-Fixed Service ("POFS")
 - Stations, including Multiple Address Systems ("MAS"), but
 - Excluding 18 GHz POFS Video Entertainment Stations^{3/}
- Private Land Mobile Radio Service ("PLMRS") Stations Below 470 MHz
- 800/900 MHz Non-SMRs
- 800 MHz General Category Stations
- 470-512 MHz PLMRS Stations
- Alaska Private-Fixed Stations
- Marine Operational-Fixed Stations
- Marine Support Stations
- Aviation and Marine Stations in the Radiodetermination Service
- Aeronautical Utility Mobile Stations
- Aeronautical Advisory (Unicom) Stations
- Aeronautical Multicom Stations

API member companies employ radio facilities in each of the categories to support critical internal operations. Be it in the exploration, production, transportation, or distribution of petroleum or natural gas, member companies rely heavily on their internal radio systems to ensure their business is conducted as safely and efficiently as possible. These uses clearly fall into the statute's

^{3/} API understands that most 18 GHz video entertainment stations will support subscriber-based services on a private carrier basis and, consequently, the licenses for such stations should be auctioned.

exemption for private-use spectrum. API stands ready to provide the Commission greater detail on the private applications of each of these systems if comments filed in this proceeding challenge API's characterizations of them.

B. Licenses for C and Ku-Band Earth Stations Should Not Be Subject to Auctions.

9. The Commission should clarify that, while auction procedures will be used in the licensing of mutually exclusive applications for common carrier facilities, this conclusion cannot extend to C and Ku-band earth station licenses. Applications for these facilities do not meet two of the prerequisites for asserting auction authority.

10. In the first instance, earth station licenses issued in the C and Ku-band are not exclusive. In the C-band, potential licensees must coordinate their applications to ensure that their proposed systems will not interfere with terrestrial microwave systems which share the band. However, once coordinated with terrestrial systems, the Commission routinely grants the C-band licensee authority to operate in the entire band. The space station operators then coordinate transmissions among earth stations. The procedure is identical for Ku-band operations, except that there is no terrestrial coordination requirement because the band is allocated exclusively to satellite communications. Since, under existing practices, the C and Ku-bands are shared among earth station licensees, there can be no mutually exclusive applications.

11. In addition, while certain C and Ku-band licensees operate earth stations to sell service to subscribers, API asserts that, on the whole, licensees do not principally provide subscriber services. API member companies, for example, routinely employ large numbers of C and Ku-Band earth stations to support activities in remote areas -- where wireline and point-to-point systems are impractical. Other companies have established large earth station networks for communicating among numerous, widely dispersed facilities. In practice, then, C and Ku-band earth station licensees do not employ their facilities for traditional common carrier purposes. Rather, these licensees are principally the private end-users of the Commission's space station licensees.

C. The Commission Should Promulgate Stern Regulations Discouraging Trafficking in Licenses Won by Lottery.

12. One of Congress's main goals in granting the Commission auction authority is to stem the historic, extensive speculation and subsequent trafficking in Commission licenses won by lottery. API need not recount here the Commission's experience with lotteries. It is a matter of public record. Suffice it to say that over the course of the last 10 to 15 years, the Commission has seen increasing speculative interest in its radio licenses because of the larger and larger role radio plays in our daily lives and because of the concomitantly large sums legitimate service providers will pay lottery winners in order to acquire licenses. In the past several years, speculative interest in the radio spectrum has grown to the point where the Commission now is flooded with applications each time it announces an initial lottery for licenses.

13. Extensive speculation and trafficking in licenses has greatly disserved the public interest and has prejudiced the interests of applicants with bona fide needs for the spectrum, such as API member companies. The application floods have imposed massive administrative burdens on the Commission's staff, demanding reallocation of the Commission's limited resources. Despite reallocation of resources, the application floods have caused extensive delays in the licensing process. Worse, the ability to traffic in Commission authorizations won by lottery has resulted in grossly inefficient license distribution. As the Commission's auction authority recognizes, due to spectrum scarcity, bona fide entities who have lost in lotteries often have had to pay greenmail to speculators to obtain licenses they need.

14. Auctioning off spectrum used principally for subscriber-based services certainly should mitigate speculation in future Commission lotteries, since that spectrum is most hotly sought. Nonetheless, API foresees the possibility that speculators will continue to take part in Commission lotteries in large numbers despite the Commission's existing efforts to discourage it. Without more stern lottery rules, their activities are unlikely to cease. Moreover, as it has done in the past, the Commission could decide in future allocations to encourage intensive use of the spectrum by allowing licensees to provide ancillary subscriber services on private spectrum. While such a goal is commendable, it potentially opens the door to profiteers.

15. Accordingly, API urges the Commission to adopt strict rules and restrictions to stem speculation and trafficking in licenses won by lottery. The

Notice recognizes the Commission's authority to assess payments to prevent unjust enrichment from lotteried licenses. Notice at ¶ 89. API supports such payments in those cases where the circumstances indicate that a licensee simply is trafficking in licenses.

16. Since determining whether trafficking has occurred can be a complex factual question, API also recommends that Commission adopt anti-trafficking restrictions which aim to discourage potential traffickers from participating in Commission lotteries in the first place. This could be accomplished by requiring applicants to post performance bonds, similar financial guarantees, or advance payments on spectrum "user fees" prior to lottery (with only the lottery winner's submission to be retained), or by requiring such payments within days after a lottery winner is announced.

17. API also recommends that the Commission re-examine procedural mechanisms for discouraging speculation, such as adopting stricter entry criteria for lottery participation and adopting stricter system implementation rules. While procedural mechanisms have been employed in the past in an effort to weed out speculators and potential traffickers, the Commission's auction authority, which focuses on the distinction between subscriber and non-subscriber based services, should give the Commission new bases for tightening them. Stricter entry criteria, for example, could include a requirement that each applicant certify that it will employ its systems principally for internal purposes. Stricter system implementation rules might require a licensee to meet specific construction dates and to periodically recertify that its on-going

operations principally are private. Failure to meet such requirements should disqualify the applicant or result in automatic license cancellation.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully urges the Federal Communications Commission to implement its auction and anti-trafficking authority consistent with the views expressed herein.

Respectfully submitted,

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